Supreme Court, U.S.
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No. 99-1967

In The

Supreme Court of the United States

JOSEPH FRANCOLINO, et al.,

Petitioners,

v.

STATE OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New York, Appellate Division, First Department

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where, as here, the prosecutor directly or indirectly selects the judge to preside over a criminal case, whether the defendant's right to due process is violated and prejudice is presumed, a question substantially the same as Question 1 in the petition for a writ of certiorari in *Pearson v. United States, petition for cert. filed* May 25, 2000 (No. 99-9680)?

2. If prejudice is not presumed and something more than the prosecutor's selecting the judge is required to obtain reversal of a conviction on direct appeal, must it be a showing of biased rulings or conduct by the judge that would invalidate the conviction in any event notwithstanding whether the prosecutor had selected her, or may it be a lesser or different showing than such "actual prejudice"?

3. Whether the prosecutor's selection of the judge denied Petitioners due process in this case in light of the judge's pro-prosecution conduct from arraignment through sentencing?

4. Whether the trial court diluted the standard of proof beyond a reasonable doubt by charging the jury, over objection, that it is their function "to determine the reasonable probabilities arising from the case after carefully analyzing and weighing the testimony of each witness and all the other evidence in the case"?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were Petitioners Joseph Francolino, Duffy Waste and Recycling Corp., the Association of Trade Waste Removers of Greater New York Inc. and Alfonso Malangone, all of whom join in this petition.

CORPORATE DISCLOSURE STATEMENT

With respect to Duffy Waste and Recycling Corp. and the Association of Trade Waste Removers of Greater New York Inc. there is no parent company and no publicly held company owning ten percent or more of either corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray for a writ of certiorari to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Department, in this case.

OPINIONS BELOW

The Supreme Court of the State of New York, Appellate Division, First Department, ("Appellate Division") affirmed the judgments of conviction of the Supreme Court, New York County, in an opinion reported at *People v. Association of Trade Waste Removers of Greater New York*, ___ A.D.2d ___, 701 N.Y.S.2d 12 (1st Dept. 1999), and reprinted in the appendix at App. 1. A pre-trial opinion of the Supreme Court, New York County, which is unreported, is reprinted in the appendix at App. 8.

JURISDICTION

The judgment of the Appellate Division was entered on December 21, 1999, and Petitioners' applications for leave to appeal to the New York Court of Appeals were denied on March 21, 2000. (App. 13.) This petition for a writ of certiorari is filed within ninety days of the order denying the applications for leave to appeal, in compliance with Rule 13 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V, provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment XIV, provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

1. Petitioner Joseph Francolino was proprietor of Petitioner Duffy Waste and Recycling Corp. ("Duffy") and in mid-1994 also became executive director of Petitioner Association of Trade Waste Removers of Greater New York ("the Association"). A New York state special grand jury empanelled in November 1994 in front of the Honorable Leslie Crocker Snyder, an Acting Justice of the Supreme Court, New York County, returned an indictment in June 1995 charging numerous individual and corporate defendants in the New York City carting industry, including four trade associations, with banding together as a "cartel" to commit a variety of New York state crimes related to anticompetitive practices, alleged as combination in restraint of trade, grand larceny by extortion, and coercion. The anticompetitive practice at the core of the charges was said to be a customer allocation arrangement under which a member-carter of a trade association was considered to have "property rights" in his customers and, if a customer changed carters, the newly retained carter paid "compensation" to the outgoing carter.

2. The defendants were arraigned on the indictment before Justice Snyder, who had been assigned to the case for all purposes. Justice Snyder, according to a magazine article entitled "The Enforcer" showcasing her, is a self-proclaimed "fan of law enforcement," using the bench to advance her particular agenda, in one case, for example, giving the longest sentences to defendants "who had been 'smirking and sneering' at her," because:

> "For some defendants, it is very difficult to have a woman in a place of authority over them," she says. "Some of them come from a Latino culture. It is a gross generalization, I know, but their

attitude frequently begins with a sneering it's-just-a-broad thing."

"The Enforcer," *New York Magazine* 36-37 (Mar. 30, 1998).

Throughout the arraignment, in the course of setting high bail for the numerous defendants, Justice Snyder stated, among other things: "I do have some familiarity with the case because I was the Judge who signed some of the wire taps and search warrants, all of the search warrants" (6/22/95 T 11)[1]; "The evidence against [co-defendant] Mr. Giovinco is very, very serious in this case. Since I am familiar with not all of it, but certainly some of it, I think a bail in the amount of $250,000.00 is reasonable" (6/22/95 T 16); "I did not go into detail the extent of evidence against your client, obviously, that has weighed heavily in my decision" (6/22/95 T 26); "I don't want to try this case now. I am amazed you [counsel for a defendant] could demean the extent of the evidence in this case, given the massive encompassed nature of this indictment, the extent of the wiretaps evidence" (6/22/95 T 33); "In view of all of the evidence in this case with which you're not yet familiar, that is perhaps – will become clear to you later on. I am familiar with the part of it, my role previously in this case. I am ready to proceed to set bail unless you have anything to add. I will not demean the extent or all encompassing nature of this indictment" (6/22/95 T 33); "You claim your client has – I am not interested in that. I am familiar with this investigation. You may have heard me say I supervised some of the wiretaps. I signed all of the search warrants. Obviously, after reading them carefully – " (6/22/95 T 129).

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[1] Numbers preceded by "T" refer to pages of the trial transcript; where the transcript is of a proceeding prior to trial, a date precedes the "T."

Others of Justice Snyder's comments at the arraignment echoed sentiments expressed by the District Attorney in his press release announcing the indictment, for example, the indictment "will bring probably the greatest reform to an entire industry, if the People are able to prove these charges" (6/22/95 T 23) and "it will change the practices of the entire industry and the People are charging the massive overpricing and price fixing in this case will result in millions of dollars savings to companies and consumers if these charges are proven." (6/22/95 T 34)

3. Maintaining that the prosecutor had brought about the selection of Justice Snyder to preside over this particular case – by taking wiretap and search warrant applications to her and pre-ordaining her selection as judge to supervise the grand jury and preside over any indictment – Petitioners and co-defendants moved pretrial for "an order re-assigning this case to a judge selected in accordance with the Due Process Clauses of the state and federal constitutions," that is, to any judge *not* selected by the prosecutor. (Def. Notice of Motion dated February 16, 1996.) The prosecutor would neither admit nor deny that it had selected Justice Snyder, responding only that Justice Snyder's review of eavesdropping applications was done "with the approval of" the Administrative Judge and in accordance with pertinent procedures.[2] (Letter of Assistant District Attorney Patrick J. Dugan dated November 28, 1995, annexed to Affirmation of Diarmuid White dated February 16, 1996.)

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[2] Not until on appeal of Petitioners' convictions did the People finally concede that they "took" their applications for eavesdropping warrants and subsequent applications for search warrants to Justice Snyder and then "sought her permission" to empanel a grand jury to hear the evidence. (Peo. App. Div. Brf. at 122.)

The People argued that in any event "prosecutorial steering" does not deny a defendant due process absent "actual prejudice." (Peo. Memo. in Opp. dated April 18, 1996, at 7.) Petitioners' motion was denied – without a requested hearing – in a written decision by Justice Snyder dated May 13, 1996, stating that "the assignment of this case for trial purposes was done in accordance with the rules of the Administrative Judge."[3] (App. 9)

On June 26, 1997, during the course of the ensuing trial, Petitioners moved to renew the motion after the Administrative Judge submitted an affidavit in an unrelated proceeding, declaring that "[t]he District Attorney had been advised in February, 1995 that the practice of the District Attorney selecting a judge to empanel and supervise a grand jury and to receive any indictments voted by such body was being discontinued." (Affidavit of Hon. Juanita Bing Newton dated June 16, 1997, at ¶ 4, annexed to Affirmation of Diarmuid White dated June 24, 1997.) The affidavit referred to this discontinued practice as a "long-time" one, declaring with respect to an internal memorandum written by the Administrative Judge to the judges of the Supreme Court on October 2, 1995, that the memorandum "was designed to explain to my colleagues that the long-time practice, which permitted the District Attorney the latitude to decide when a Special Grand Jury was needed and to select the judge to supervise the body, had been discontinued." (Newton Affidavit at ¶ 12) Here, a Special Grand Jury was empanelled in front of

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[3] The decision incorrectly ascribed to the defendants their agreement with this statement. Actually, the defendants had stated that "absent supporting facts that might come to light at a hearing" – which hearing was requested but denied – their motion was not predicated on a claim that the rules governing assignment of judges were not complied with. (White February 16, 1996, Affirmation at 3-4.)

Justice Snyder on November 9, 1994, well before February, 1995, when the practice of the District Attorney's selecting the judge to empanel and supervise a grand jury and to receive any indictments voted by it was discontinued. (White June 24, 1997, Affirmation at ¶ 6.) Petitioners' mid-trial motion was summarily denied in open court on the same day it was filed, without response by the prosecutor or comment by the court. (App. 12)

4. Most of the defendants disposed of their cases through negotiated guilty pleas before trial and during trial, with only two individual defendants, Petitioners Francolino and Alfonso Malangone, and four corporate defendants – including Petitioners Duffy and the Association – proceeding to verdict. Prior to and during the course of the trial, Justice Snyder exhibited, frequently in front of the jury, pro-prosecution bias and marked antipathy toward the defendants, their counsel and their cause. Early in the trial, Justice Snyder, having already told defense counsel that "I will do things that you won't like when you treat me in a way I don't like" (T 6262), further warned them that "[i]f you attempt to do anything cute in front of the jury, I will take care of that in my own way, by giving the jury a lecture on the law and telling them things that you assume they didn't know, and, believe me, I'll do it." (T 6358) As will be shown in the illustrative summary that follows, Justice Snyder delivered on this threat.[4]

As one example, during cross-examination of a prosecution witness by counsel for Petitioner Association,

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[4] The record necessarily cannot reflect the questions *unasked* and the arguments *not* made by defense counsel because of the unquestionable *in terrorem* effect of the court's warnings and invective.

Justice Snyder, even though not sustaining the prosecutor's objection to a question whether carters required a license to remove garbage, told the jury, more than a month after opening statements:

> In Mr. White's opening we heard a dissertation about various aspects of the garbage business and numerous other things which are totally irrelevant to this case. I'll be charging you about that at the end.
>
> You will not hear many of the things during cross or in summation that you heard in openings. I think that will become clear to you. So, put that out of your mind.
>
> I'll allow a limited number of questions.
>
> MR. WHITE: I object to that, Your Honor.
>
> THE COURT: I'm sure you do. (T 8167-68)

Similarly, when counsel for Petitioner Association sought to develop through cross-examination of an undercover detective that the discontinuance of service by one carting company cooperating with the District Attorney's investigation, Chambers, with respect to another such company, BFI, was orchestrated by investigators, not coerced by defendants, Justice Snyder undercut the effort:

> Q. Did you participate any time during – well, in 1994, did you participate in any discussions with Sal Benedetto [of Chambers] and Assistant District Attorneys regarding BFI's relationship with Chambers?
>
> [THE PROSECUTOR]: Objection.
>
> THE COURT: BFI's not on trial here despite all these questions. I want you to keep that in mind. The defendants are on trial. It is up to the Prosecution to prove their guilt if they are able to do so as to each one considered separately by proof beyond a reasonable doubt.

Sustained.

MR. WHITE: I object to the Court's instruction, your Honor. (T 8355-56)

During cross-examination of prosecution witnesses, Justice Snyder took it upon herself to rehabilitate them or to blunt any point the defense may have made. For example, when an FBI agent testified that certain conversations between an undercover detective and defendants were either not recorded or inaudible due to transmitter problems, and defense counsel suggested through his questions that these conversations may have been deliberately garbled or not recorded by the undercover, the judge intervened at the end of the agent's testimony: "I just want to ask you one question though before we end. Regardless of what would be the ideal equipment, isn't the primary concern of any law enforcement operation based on your experience the safety of the undercover?" (T 3209-10) The jurors' focus was thereby diverted to the idea that the undercover detective in this case worked at risk to his safety. Later, when Petitioner Francolino's counsel confronted the undercover detective with his misattribution of a damaging taped statement to Francolino, the judge intervened, asking "[a]ctually, you did make a number of mistakes, despite your best efforts not to make one?" and adding "[s]o being a human being, your job wasn't a hundred percent?" (T 7828-7829) During re-cross, the judge completed the prosecutorial task of rehabilitation by asking the witness, with respect to the misattributed statement, "Did Mr. Francolino in any way contradict anything [the speaker] said?" (T 8802) After defense counsel collectively objected, including an objection to the leading nature of the question, and after the witness responded, "No," the judge stated "Withdrawn," in a transparent effort to protect the record. (T 8803)

When the defense sought to develop the theory, supported by both grand jury testimony and earlier trial

testimony, that the owner of a cooperating carting company, Sal Benedetto, was orchestrating investigative decisions for his own company's financial benefit – thus negating the prosecution theory of extortion – Justice Snyder intervened to ask the undercover detective a leading question undermining the defense theory: "Obviously I would assume that you had to take some advice from Sal as to your decisions pertaining to carters since you were learning the industry. Is that accurate?" (T 8765) Reacting to a chorus of objections from all defense counsel, the judge cut off Petitioner Francolino's counsel's follow-up question and followed up with a series of similarly purposeful leading questions of her own, over repeated objections: "The investigative decisions, were they made by the Police Department?"; "And in conjunction with the District Attorney's Office?"; "That in no way meant that you didn't have to learn the carting business from people who had been in it like Sal. Is that accurate?" The judge punctuated this peevish reaction to the objections by stating to defense counsel in front of the jury: "You want to be fresh, go right ahead." (T 8766-67; *see also* T 8264-8270)

Justice Snyder did not limit herself to rehabilitating prosecution witnesses, but also sought to score affirmative points for the prosecution. When counsel for Petitioner Francolino, cross-examining the undercover detective, read a portion of a tape transcript in evidence in which Francolino gave an innocent explanation for the payment of "compensation" by carters – namely, saving legal fees – Justice Snyder jumped in and, isolating one sentence in the transcript, asked the witness: "Incidentally, what was your understanding of what Mr. Francolino meant when he said that he wasn't doing anything *totally* illegal?" (T 8771; emphasis added.) Defense counsel immediately and collectively objected, including

objecting to the court's tone, that is, her emphasizing the phrase "*totally* illegal," to which the judge inappropriately rejoined in front of the jury: "Every question you've been asking has been in a sarcastic or other similar tone of voice." (T 8771-72)

Another illustration of lack of impartiality is Justice Snyder's disparate rulings regarding identical questions by the prosecution and by defense counsel. During *direct* examination of an undercover detective, the prosecutor asked him repeatedly what he understood a particular tape-recorded statement made in his presence to mean. *See, e.g.*, T 3702-03:

> Q: *What was your understanding with respect to what he [co-indictee Vulpis] meant?*
>
> [COUNSEL FOR MALANGONE]: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: That he wanted another individual that was working with him in settling this problem and he later mentioned a name P.J. Piccolo of Dynamic Carting. . . . (Emphasis added.)

Such questioning is common practice in tape cases, because the auditor is competent to testify as to his own understanding of a speaker's remark. But when counsel for a co-defendant asked the undercover detective a question in almost identical form, Justice Snyder sustained the objection.

> Q: Mr. Pecoraro said, I told you right now everybody is pursuing the lawsuit. *What was your understanding of what he [co-indictee Pecoraro] meant?*
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained. (T 7163; emphasis added.)

Justice Snyder also gratuitously deflated defense arguments to the jury. As counsel for the Association was concluding his summation, he argued that his greatest concern was that Petitioners Francolino and the Association would not be judged on the evidence or lack of evidence, but would be convicted based on a view that Francolino might be an organized crime figure, "[i]n other words, be convicted on guilt by association." (T 11674) After counsel developed this theme, to which there was no objection by the prosecution, Justice Snyder deprecatingly interposed: "I'll be instructing you that nobody can be convicted by guilt by association. That's something any school child knows." (T 11675) The judge had earlier attempted to invalidate Association counsel's summation, and destroy his credibility, *in toto*. When, without an objection from the prosecutor, the judge interjected "Sustained" with respect to an argument regarding waste removal pricing, counsel said "I need a sidebar, your Honor." (T 11520) Justice Snyder, in front of the jury and without any basis in fact, responded: "Do not argue in front of the jury. I already listened to you make a number of illegal arguments that are frankly misleading to this jury," to which all defense counsel objected. (T 11519-20)

On the other hand, Justice Snyder reinforced the prosecution arguments, most notably that the defendants had "acted in concert," the theory which the prosecution emphasized from the beginning of trial, including singling it out during *voir dire* of the jury panel. In the court's charge, Justice Snyder not only instructed the jury on "acting in concert" at an appropriate place in the charge (T 12287-94), but *concluded* her entire charge to the jury by instructing them on it *again*, pausing to give it special attention and to focus the jury on it. (T 12534-45) That the judge charged the jury *twice* on the theory of

prosecution, including a reprise at the final stress point of the charge, was no casual afterthought, because Justice Snyder had earlier *told* the jury during summations – very inappropriately, it is submitted – that "[a]cting in concert is an extraordinary [*sic*] important concept in this case because the theory of virtually every count in the case by the People is that each defendant was not acting alone in most situations, but was, in fact, acting in concert." (T 11748)

5. The court charged the jury as follows with respect to drawing inferences from the evidence:

> Now, each of you has it within your power to draw proper, reasonable and just inferences from the testimony, the exhibits and the stipulations. In other words, from the evidence in this case. And to determine the *reasonable probabilities arising from the case after carefully analyzing and weighing* the testimony of each witness and all the other testimony in the case. (T 12265; emphasis added.)[5]

Defense counsel objected to this instruction, urging that the use of the word "probabilities" diluted the standard of proof beyond a reasonable doubt. (T 12584-85) The court responded that "[t]hat's the standard language I use in every charge" and "that's just a word that's used." (T 12585)

6. The jury found all defendants guilty on virtually all counts charged.

7. Justice Snyder, whose characterization of Petitioner Francolino as a "prima donna" (T 10805) was only one reflection of her personal animus toward him, sentenced him vindictively to an indeterminate term of imprisonment of ten to 30 years – at least twice as long as

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[5] The court's ensuing charge on reasonable doubt itself is set out in the Appendix. (App. 15)

any other defendant, including some who had engaged in violence – and a fine of $900,000, for a conviction grounded on anticompetitive conduct by participating in an unlawful market allocation scheme. Petitioners Duffy and the Association also received substantial fines.

8. On appeal, the Appellate Division in one sentence rejected Petitioners' claim that "The District Attorney's Selection Of The Judge To Preside Over This Case Violated The State And Federal Due Process Clauses" (Association's App. Div. Brf., Point II),[6] stating only that "[t]he process by which the Trial Justice was assigned to preside complied with applicable rules and was in no way prejudicial to defendants."[7] (App. 6.) The court cited only its own precedent, *Matter of Coastal Oil v. Newton*, 231 A.D.2d 55, 660 N.Y.S.2d 428 (1st Dept.), *appeal dismissed*, 91 N.Y.2d 848, 667 N.Y.S.2d 683 (1997), *lv. denied*, 91 N.Y.2d 808, 669 N.Y.S.2d 269 (1998), in which the Appellate Division had declared that "prosecutorial judge shopping . . . is not a cognizable injury" and "[t]here can be no due process violation without actual prejudice." 231 A.D.2d at 57, 660 N.Y.S.2d at 429. (App. 6.) As to Petitioners' claim that "The Court Diluted The Standard Of Proof Beyond A Reasonable Doubt By Charging The Jury, Over Objection, That It Was Their Function 'To Determine The Reasonable Probabilities Arising From The Case After Carefully Analyzing And Weighing The Testimony Of Each Witness And All The Other Evidence In The Case' " (Association's App. Div. Brf., Point IV), the Appellate Division's only apparent reference to it was

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[6] Petitioners joined in each others' arguments in the Appellate Division.

[7] The court gave no basis for its conclusion that the process by which the judge was assigned complied with applicable rules. *See* note 3, *supra*.

that the trial court gave "correct and balanced charges" on numerous issues, including "the People's burden of proof." (App. 4.)

9. The New York Court of Appeals denied Petitioners' application for leave to appeal. (App. 13.)

REASONS FOR GRANTING THE PETITION

I

Prosecutorial Judge-Shopping Strikes at The Core of Fairness in Criminal Proceedings, But If Not Deemed Structural Error Or if Defendants Are Required to Show "Actual Prejudice" beyond The Prosecutor's Picking The Judge in Order to Obtain Relief, This Abuse Is Insulated from Redress, Thereby Corroding The Integrity of The Criminal Justice System – in Fact And in Appearance.

1. "[T]he impartiality of the adjudicator goes to the very integrity of the legal system," and thus "[t]he right to an impartial adjudicator, be it judge or jury," is a right " 'so basic to a fair trial that [its] infraction can never be treated as harmless error.' " *Gray v. Mississippi*, 481 U.S. 648, 668 (1987), *quoting Chapman v. California*, 386 U.S. 18, 23 (1967).

Since every member of the public would look askance at a prizefight in which one of the boxers picked the referee, it seems obvious that in a criminal case it is unfair for one of the parties to pick the judge. *See Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987) ("[w]hile a defendant has no right to any particular procedure for the selection of the judge . . . he is entitled to have that decision made in a manner free from bias or the desire to influence the outcome of the proceedings"). Yet the New York Supreme Court, Appellate Division, would require a showing of "actual prejudice" before a prosecutor's selection of the judge to preside over a criminal case could

amount to a due process violation. App. 6; *Matter of Coastal Oil v. Newton*, 231 A.D.2d at 57, 660 N.Y.S.2d at 429 ("prosecutorial judge shopping . . . is not a cognizable injury" and "[t]here can be no due process violation without actual prejudice"). In analogous vein, the United States Court of Appeals for the Tenth Circuit this year assumed without deciding that the prosecution deprived the defendant of the right to due process by manipulating the system so that his case was assigned to a particular judge, yet went on to hold that such a deprivation is not "structural error" but is subject to harmless error analysis in which actual prejudice would have to be demonstrated. *United States v. Pearson*, 203 F.2d 1243, 1259-63 (10th Cir. 2000), *petition for cert. filed* May 25, 2000 (No. 99-9680).

The Appellate Division has not specified what would constitute "actual prejudice" in cases of prosecutorial judge-shopping, but the *Pearson* opinion indicates it would require establishing that the judge acted in a partial manner so as to substantially influence the outcome of the trial. *See Pearson*, 203 F.3d at 1262. In other words, one might say, it is not enough to catch the butcher with his thumb on the scale; you must also show that the meat is tainted. Of course, a showing that the judge acted in a partial manner so as to influence the outcome of the trial would require reversal of a conviction even if the judge was *not* selected by the prosecutor. *See Quercia v. United States*, 289 U.S. 466 (1933). Thus, the net result of cases such as this one and *Pearson* is to provide license for continued prosecutorial judge-shopping, since there is no disincentive to engage in it. This is unwise, unfair, and corrosive of the integrity of the criminal justice system – in fact and, of equal importance, in appearance. *See J.E.B.*

v. Alabama, 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting) ("Wise observers have long understood that the appearance of justice is as important as its reality").

2. Since "[t]he Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases," *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), including "a neutral and detached judge," *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972), permitting one party to tip the scales in its favor by choosing a judge of its own preference to decide a matter or preside over a controversy denies due process to the opposing party. *See Tumey v. Ohio*, 273 U.S. 510, 532 (1927) ("[e]very procedure which would offer a possible temptation to the average man as a judge. . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law"). A party permitted to select the judge would almost inevitably choose one whom that party considers favorably disposed to it or its cause. Thus, prejudice should be presumed when a prosecutor selects the judge, and any further showing of actual prejudice deemed superfluous.

To say that prejudice is presumed in given circumstances is not to engage in baseless speculation or to say that there could never be such a case in which a defendant was not prejudiced, but to recognize that "[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland v. Washington*, 466 U.S. 668, 692 (1984), *citing United States v. Cronic*, 466 U.S. 648, 659 (1984) (collecting cases); *In re Murchison*, 349 U.S. 133, 136 (1955) (due process may sometimes bar trial "by judges who have no actual bias"). Thus, it is no answer, as the Tenth Circuit said in rejecting the structural error model in *Pearson*, that "a defendant in a case in which the prosecutor has selected the judge does not *necessarily* receive a trial that 'cannot reliably serve its

function as a vehicle for determination of guilt or innocence' and consequently renders any resulting punishment fundamentally unfair." 203 F.3d at 1262 (emphasis added), *quoting Rose v. Clark*, 478 U.S. 570, 579 (1986).

Moreover, bias is not easily exposed, and the inability to unearth and identify it does not mean its non-existence. *Cf. United States v. Wood*, 299 U.S. 123, 133 (1936) (under "implied bias" doctrine, prospective juror's bias can be "conclusively presumed" from the facts and circumstances despite juror's disavowals); *Smith v. Phillips*, 455 U.S. 209, 222, 223 n.* (1982) (O'Connor, J., concurring) ("[d]etermining whether a juror is biased or has prejudged a case can be difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it"). Exposing a judge's bias is particularly difficult, since a judge exercises varying degrees of control over the content and shape of the record.

That prejudice inheres in one party's selection of a judge is made clear by analogy to cases where a judge has a direct and substantial financial interest in the outcome. No one would seriously argue that a showing of such financial interest is insufficient and that the aggrieved party must also show that the judge is actually biased. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court held that an Alabama Supreme Court justice's involvement in the case on appeal "violated the appellant's due process rights" because the judge had himself filed two actions raising similar claims against insurance companies. *Id.* at 825. In so holding, the Court pointed out that it was "*not* required to decide whether the judge was influenced," and observed:

> The Due Process Clause "may sometimes bar trial by judges *who have no actual bias* and who would do their very best to weigh the scales

> equally between contending parties. But to perform its high function in the best way, " 'justice must satisfy the appearance of justice.' "

Id., citing In re Murchison, 349 U.S. at 136 (internal citation omitted by Court) (emphasis added).

Thus, it should be clear that a due process violation can be made out without a showing of "actual prejudice" or, alternately, that prejudice may be presumed in certain circumstances where – based on external facts like a judge's interest in the outcome or a party's selecting the judge to preside – the public would reasonably question a judge's ability to be impartial. In short, all criminal proceedings must have "the appearance of evenhanded justice which is at the core of due process." *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J. concurring); *see also United States v. Antar*, 53 F.3d 568, 576 (3d Cir. 1995) ("[i]f there is an appearance of partiality, that ends the matter [since] '[i]mpartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system' ") (citation omitted).

Although the Appellate Division provided no source for its requirement of "actual prejudice," the Tenth Circuit in *United States v. Pearson* engaged in a rather extensive analysis in holding that the prosecution's selection of the judge to preside over a criminal matter is not structural error and thus may be harmless. 203 F.3d at 1260-62. Drawing in part from the Second Circuit's review of the principle of structural error in *Yarborough v. Keane*, 101 F.3d 894, 897 (2d Cir. 1996), the *Pearson* court envisioned a "continuum" on which the right violated, as well as the nature, context and significance of the violation, is placed to determine whether an error is structural. *Id.* Before placing on such a continuum the due process violation resulting from the prosecutor's selection of the judge, the Tenth Circuit conceptualized the prosecutor's action as "perform[ing] a kind of quasi-judicial function," and then

distinguished this from performing post-selection judicial functions like ruling on motions and objections, issuing findings of fact and conclusions of law, and sentencing defendants. *Id.* The court then concluded: "Although a prosecutor's performance of such post-selection judicial functions necessarily deprives the defendant of an impartial adjudicator, we conclude for several reasons that prosecutorial involvement in the selection of the judge does not necessarily result in the same degree of deprivation." *Id.*

While Petitioners here, in the posture of certiorari, cannot fully dissect *Pearson*'s analysis and conclusion, Petitioners respectfully submit that the Tenth Circuit's "continuum" approach to structural error is flawed and that the court's conception of a prosecutor's selection of the judge as a quasi-judicial function to be gauged against post-selection judicial functions is both arbitrary and invalid. First, although one would not argue that the right violated, as well as the nature, context and significance of the violation, must be assessed in determining whether an error is structural, the "continuum" approach appears to put errors on a horizontal plane along which a rising degree of prejudice develops at some point into structural error. This approach is flawed because it tends to conflate the ideas of quantifiable prejudice and structural error.

Although the *Pearson* court professes to have adopted the Second Circuit's analysis of structural error in *Yarborough v. Keane*, 101 F.3d 894, the Second Circuit opinion, properly we submit, can be viewed as putting on a vertical plane what would clearly be a structural error if the *incidence* of the error was significant, as opposed to trivial. Degree of prejudice has nothing to do with it. The *Yarborough* court pointed out that *Arizona v. Fulminante*,

499 U.S. 279 (1991), "distinguishes between errors of sufficient magnitude or significance that they call into question the validity of the proceeding and are therefore deemed structural, and trivial violations of the same rights, which are not." 101 F.3d at 897. Thus, the Second Circuit held in the case before it that the defendant's absence from a hearing which "was extremely brief and was not even part of the trial proper" was of "minimal importance" and, therefore, was not structural error, since it did not call into question the fundamental fairness of the trial. *Id.* at 898. Here, Petitioners would agree that if the prosecutor had selected a judge to preside over an isolated proceeding incidental to the case, rather than the entire case from arraignment through sentencing, such a trivial error, no matter how odious, would not be structural.

The *Pearson* court's "continuum" approach being thus flawed, its "quasi-judicial function"/"post-selection judicial functions" weighing of "degree of deprivation" is invalid; there is nothing trivial about the prosecutor's selection of the judge to preside over the entire case. Moreover, the pre-/post-selection dichotomy is arbitrary, because the judge who performs the post-selection functions has been *chosen* by the prosecutor, and thus the prosecutor's action impacts continuously on the case until its end. The error is one "affecting the framework in which the trial proceeds" and "[t]he entire conduct of the trial from beginning to end." *Fulminante*, 499 U.S. at 310; *see also Brecht v. Abrahamson*, 597 U.S. 619, 629-30 (1993) ("The existence of such defects . . . requires automatic reversal of the conviction because they infect the entire process"). It is therefore structural error, requiring no showing of "actual prejudice" or other effect on the outcome.

3. The Tenth Circuit in *Pearson* also relied on *Tyson v. Trigg*, 50 F.3d 436 (7th Cir. 1995), *cert. denied*, 516 U.S. 1041 (1996), as "expressly reject[ing] the argument that allowing a prosecutor to select the judge constitutes structural error." *Pearson*, 203 F.3d at 1262, *citing Tyson*, 50 F.3d at 442. This grossly overstates *Tyson*'s language, analysis and holding. Putting aside that the *Tyson* opinion nowhere mentions the term "structural error" or even cites *Arizona v. Fulminante*, 499 U.S. 279, *Tyson* turned on the fact that it was a habeas corpus proceeding and the petitioner, in the Seventh Circuit's judgment, was asking for a "new rule" of constitutional law. 50 F.3d at 439-440. The Seventh Circuit allowed that if a litigant can choose which judge was to preside at trial "that party may be able to obtain a subtle advantage over the other by selecting a judge more likely to resolve close questions in that party's favor," *id.* at 439, but concluded that if the constitutional infirmity "is subtle, habeas corpus is not the place to challenge it." *Id.* at 440. In the Seventh Circuit's judgment, "[t]he system of criminal procedure, far from being balanced every step of the way, is an aggregate of imbalances." *Id.* This language was quoted with approval by the *Pearson* court, 203 F.3d at 1258, but it is a poor excuse, in Petitioners' view, for leaving prosecutorial judge-shopping unremedied.

Notably, the *Tyson* court observed that, unlike here, once the state prosecutor in the case before it decided to proceed by grand jury, "he had *no choice* but to select the trial judge," because, under the court system in effect at the time, designation of the grand jury "carried with it designation of the trial judge." 50 F.3d at 441 (emphasis added). The court added that the habeas petitioner's premise that the judge was not chosen randomly was not known to be so and that the petitioner had made no effort to determine the reason for the designation. *Id.* at 441-42.

Moreover, the petitioner in *Tyson* "d[id] not claim that [the judge] was prejudiced against him" and "disclaim[ed] making any charge of actual bias or prejudice." *Id.* at 439, 442. All that was left, so far as the record disclosed, was the "lack of appearance of impartiality," *id.* at 442, but, as the court pointed out, the petitioner did not argue that such a deficiency is a denial of due process, presumably under constraint of Seventh Circuit case law. *Id.* at 439. In any event, it was the Seventh Circuit's view in *Tyson* that "[t]he right to a judge who is free from the mere appearance of partiality is not part of due process at all, let alone a fundamental part." *Id.* at 442. It is *this* statement only that the *Pearson* court was apparently adverting to in maintaining that *Tyson* had "expressly rejected the argument that allowing a prosecutor to select the judge constitutes structural error." *Pearson*, 203 F.3d at 1262.

Finally, the *Tyson* court pointed out, incidental to its "new rule" analysis, that no other criminal defendant had ever thought to challenge the legality of the challenged system by which the judge was selected. 50 F.3d at 440. It is worth noting that quite the contrary is true in the instant case. *See, e.g., New York Criminal Bar Association v. Newton*, 33 F.Supp.3d 289 (S.D.N.Y. 1999) (dismissing on mootness and standing grounds action pursuant to 28 U.S.C. § 1983 seeking judgment declaring unconstitutional procedure whereby in "high-profile cases" New York County District Attorney's office selects "strongly pro-prosecution" judge to preside over special grand jury, which choice is adopted as trial judge by administrative judge); *Matter of Martinez v. Snyder*, 184 A.D.2d 1091, 584 N.Y.S.2d 965 (1st Dept. 1992) (table) (dismissing petition for writ of prohibition contending that selection of Justice Snyder violated rules and regulations purportedly requiring random selection of judges).

4. If one were to assume that the error is not structural and prejudice not presumed where the prosecutor picks the judge to preside over the entire case, a question would remain as to when such a practice does warrant reversal of a conviction. The Appellate Division would require a showing of actual prejudice, although its precise contours are unknown, and Tenth Circuit would look to harmless error, that is, whether the error contributed to the verdict. *See* App. 6; *Pearson*, 203 F.3d at 1262-63, *citing Chapman v. California*, 386 U.S. at 22. Neither is appropriate or suitable.

In *Liteky v. United States*, 510 U.S. 540 (1994), addressing whether recusal of a federal judge was required under the "bias or prejudice" component of 28 U.S.C. § 455(a), the Court observed that neither judicial rulings nor judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases support a claim of bias or partiality unless they reveal "such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* at 555. Whether the quoted formulation is equivalent to "actual prejudice" or an error contributing to the verdict, and whether the Court would apply the same or similar standard to a due process claim that a state or federal judge should have disqualified herself, is open to debate. But assuming it would, the same standard should not apply where there is the *additional* element that the prosecutor selected the judge.

When the prosecutor selects the judge, the *perception* of unfairness and the *risk* of prejudice is substantial enough that judicial rulings and judicial remarks during the course of a trial that are critical or disapproving of, or hostile to, counsel, the parties or their cases *should*, unlike in *Liteky*, warrant reversal even if they do not rise to the level of revealing such a high degree of favoritism or

antagonism as to make fair judgment impossible. This is so because, first, where the prosecutor picks the judge, the integrity of the criminal justice system that allows it is thrown into question, and the appearance of justice is not satisfied. Second, it is fair to infer that the prosecutor selected the particular judge in anticipation of favorable treatment,[8] especially with respect to the countless *discretionary* rulings to be made in the course of the litigation. And third, such treatment may often manifest itself in ways not always apparent in the record. *Cf. Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978) ("a rule requiring a defendant to show that [his attorney's] conflict of interests . . . prejudiced him in some fashion would not be susceptible to intelligent even-handed application," and "[t]hus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation").

Here, an appearance of partiality, rather than the appearance of justice, flowed from the District Attorney's choice of the judge to preside over the case. Further, it created, at the very least, a grave risk of actual prejudice, a risk aggravated by Justice Snyder's almost three-year involvement in the investigation of this case. Such a grave risk of prejudice should require reversal, where the prosecutor has picked the judge, whether or not "actual prejudice" can be spelt out of the record.

Finally, unlike the defendant in *Pearson* and the petitioner in *Tyson*, Petitioners here submit that they *were* actually prejudiced by the prosecutor's selecting the judge.[9] Preliminarily, prosecutorial influence over the

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[8] Justice Snyder's well-cultivated public image as "the Enforcer," *see* p. 3 *supra*, graphically supports the inference here.

[9] The *Pearson* court noted that the defendant "has not alleged that he was actually prejudiced by the assignment";

selection of a judge is particularly prejudicial in New York, because New York accords defendants the statutory right to a bench trial, New York Criminal Procedure Law § 310.20 (McKinney), and a defendant would be loath to exercise that right where, as here, the prosecutor brings about the selection of the judge. Putting that to one side, the extraordinarily vast breadth and scope of Justice Snyder's three-year involvement in the investigation of this case – including her issuance of numerous electronic surveillance orders and her review of the progress of that extensive surveillance, her issuance of numerous search warrants, and her supervision of the grand jury proceedings – was of a proportion perhaps unprecedented in New York. Although opinions formed by a judge on the basis of information derived from prior proceedings do not ordinarily constitute a basis for a claim of bias or partiality, *Liteky v. United States*, 510 U.S. at 555, they will do so where "they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.*

Here, as evidenced by her statements at arraignment, some of which are set out in the Statement of the Case at 3-4, it was clear from the defendants' very first appearance that Justice Snyder's extensive involvement during the investigative stages of the case irredeemably prejudiced her against the defendants. Her declarations, echoing the District Attorney's press release, that the indictment "will bring probably the greatest reform to an entire industry, if the People are able to prove these

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"our independent review has uncovered no evidence that [the judge] decided any substantive issues in a manner more favorable to the government than the other judges in the district would have decided those issues"; and the defendant "has not made a sufficient showing of bias on the part of [the judge] under the applicable statutes." 203 F.3d at 1263.

charges" and "it will change the practices of the entire industry and the People are charging the massive over-pricing and price fixing in this case will result in millions of dollars savings to companies and consumers if these charges are proven" (6/22/95 T 23, 34), suggest that the District Attorney and Justice Snyder had been working in tandem in the investigation and prosecution of this case.[10]

Yet Justice Snyder then went on to set bail, to review the legality of all the many warrants and orders she had issued, assess the regularity of the extended grand jury proceedings she had supervised, evaluate the adequacy of the evidence and instructions presented to that grand jury, and decide voluminous pretrial and *in limine* motions – virtually all in the prosecution's favor. Shortly before trial, the judge hamstrung the defendants by requiring them to make unreasonable offers of proof as a condition precedent to advancing various defense theories at trial, regardless of whether a given defense would be supported by evidence introduced by the prosecution. Petitioners, nevertheless still bold enough to proceed to trial by jury, saw the jury turned against them by the judge's behavior, purposeful rulings and devastating remarks; saw their ability to effectively examine witnesses constantly undercut; saw the jury improperly invited to count against these non-violent Petitioners

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[10] The judge's "if-these-charges-are-proven" provisos are, we submit, record-protecting devices characteristic of Justice Snyder's practice, reflected repeatedly throughout the record, of making comments damaging to the defendants, often in front of the jury, followed up by qualifying language designed to defeat any appeal. *See, e.g.*, Statement of Case at 9, where Justice Snyder "withdrew" her improper and purposeful leading question after the witness had already given his anticipated damaging response.

inflammatory evidence of violent crimes by others; saw their attempts to develop a defense based on the available evidence continually frustrated; saw their counsel barred from summing up on the favorable evidence; saw the jury charged in such a slanted manner as would guarantee convictions; and, following conviction, saw the court impose harsh sentences wholly disproportionate to the offenses and to the sentences of those who were not so bold as to perturb the judge by insisting upon a trial. Justice Snyder's deep-seated allegiance to the District Attorney's cause and an antagonism to the defendants' throughout these proceedings, indicating that fair judgment would indeed be impossible, *Liteky v. United States*, are only hinted at in the illustrations set forth in the Statement of the Case at 6-12.

Certiorari should therefore be granted to determine whether a criminal defendant's due process right to a neutral and detached judge is rendered meaningless where the prosecutor selects the judge.

II

It Dilutes The Standard Of Proof Beyond A Reasonable Doubt To Charge The Jury That Their Function Is "To Determine The Reasonable Probabilities Arising From The Case After Carefully Analyzing And Weighing The Testimony Of Each Witness And All The Other Evidence In The Case."

1. "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty. . . . " *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (emphasis in original). Here, the court charged the jury as follows with respect to drawing inferences from the evidence:

> Now, each of you has it within your power to draw proper, reasonable and just inferences

> from the testimony, the exhibits and the stipulations. In other words, from the evidence in this case. And to determine the *reasonable probabilities arising from the case after carefully analyzing and weighing* the testimony of each witness and all the other testimony in the case. (T 12265; emphasis added.)

This charge diluted the standard of proof beyond a reasonable doubt. Instructing the jury to "determine the reasonable probabilities" "arising from the case" "after carefully analyzing and weighing the testimony of each witness and all the other testimony" is, in effect, directing the jury to apply a *preponderance* of evidence standard after weighing all the evidence.

Although the court's subsequent charge on reasonable doubt stated that "[t]he law has created a very high standard of proof in criminal cases, much higher than in a civil case for example" (App. 15) this was of no avail since, first, the difference between the standards was not *explained* and, more important, the mode of analysis which the court had already given the jury – "to determine the reasonable probabilities arising from the case after carefully analyzing and weighing the testimony of each witness and all the other testimony in the case" – would readily be understood by a juror as the proper method of analysis for applying the standard of proof beyond a reasonable doubt, particularly in light of the court's definition of reasonable doubt as "a doubt which you conscientiously have after the use of your *powers of reasoning* which arise out of the credible evidence or lack of credible evidence in the case." (App. 15) (emphasis added).

The question for an appellate court, "consider[ing] how reasonable jurors could have understood the charge as a whole," *Cage v. Louisiana*, 498 U.S. 39, 41 (1990), is "whether there is a reasonable likelihood that the jury

understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard." *Victor v. Nebraska*, 511 U.S. 1, 5-6 (1994). In *In re Winship*, 397 U.S. 358 (1970), the Court stressed the differences between the preponderance and reasonable doubt standards and pointed out that "the preponderance test is susceptible to the misinterpretation that it calls on the trier of fact merely to perform an abstract weighing of the evidence." 397 U.S. at 367-68 (citation omitted). Here, the court's telling the jury "to determine the reasonable probabilities arising from the case after carefully analyzing and weighing the testimony of each witness and all the other testimony in the case" exemplified the pitfall recognized in *Winship*.

In *Victor v. Nebraska*, the trial court's charge included the following:

> You may find an accused guilty upon the *strong probabilities of the case*, provided such probabilities are *strong enough to exclude any doubt* of his guilt that is reasonable.

511 U.S. at 18 (first emphasis by the Court, second emphasis added). The Court noted the problematic nature of the use of "probabilities," but upheld the instruction, emphasizing that, "in the same sentence, the instruction informs the jury that the probabilities must be strong enough to prove the defendant's guilt beyond a reasonable doubt." *Id.* at 22, *citing Dunbar v. United States*, 156 U.S. 185, 199 (1895). Thus, the holding in *Victor* suggests that it was only the use of the modifier "strong enough to exclude any doubt" that saved the instruction. Here, the use of the much weaker "reasonable probabilities" did nothing to alert the jury that, in order to convict, the standard of proof must *heavily* weigh in favor of the prosecution so as to exclude a reasonable doubt.

2. When Petitioners objected to the challenged language, the court responded that "[t]hat's the standard

language I use in every charge." (T 12585) Courts instructing juries on how to draw inferences from the evidence must be mindful of how those instructions interplay with instructions on the standard of proof beyond a reasonable doubt. Certiorari ought be granted so this Court can ensure that otherwise constitutional instructions on reasonable doubt are not undone by inconsistent instructions on drawing inferences.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
June 6, 2000

Respectfully submitted,

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[OPINION OF NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, AFFIRMING CONVICTIONS]

Williams, J.P., Wallach, Lerner and Buckley, JJ.

2786 The People of the State of New York,
Respondent, — Amyjane Rettew

-against-

Association of Trade Waste Removers of Greater New York,
Defendant-Appellant. — Diarmuid White

New York State Association of Criminal Defense Lawyers,
Amicus Curiae — Leon Friedman & Joshua L. Dratel

2787 The People of the State of New York,
Respondent, — Amyjane Rettew

-against-

Duffy Waste and Recyling Corp.,
Defendant-Appellant. — Ronald Fischetti

New York State Association of Criminal Defense Lawyers,
Amicus Curiae — Leon Friedman & Joshua L. Dratel

2788 The People of the State of New York,
Respondent, — Amyjane Rettew

-against-

Joseph Francolino,
Defendant-Appellant. — Vivian Shevitz

New York State Association of Criminal Defense Lawyers,
Amicus Curiae — Leon Friedman & Joshua L. Dratel

2789 The People of the State of New York,
Respondent, — Amyjane Rettew

-against-

Alfonso Malangone,
Defendant-Appellant. — Alan S. Futerfas

New York State Association of Criminal Defense Lawyers,
Amicus Curiae — Leon Friedman & Joshua L. Dratel

Judgments, Supreme Court, New York County (Leslie Crocker Snyder, J.), rendered November 18, 1997 as to defendants Association of Trade Waste Removers of Greater New York ("GNY"), Duffy Waste & Recycling Corp. ("Duffy"), and Joseph Francolino, and January 12, 1998 as to defendant Alfonso Malangone, convicting all

defendants, after a joint jury trial, of enterprise corruption and various substantive counts, and sentencing GNY to a conditional discharge and a fine of $9 million, Duffy to a conditional discharge and a fine of $2 million, Francolino to an aggregate prison term of 10 to 30 years and a fine of $900,000, and Malangone to an aggregate prison term of 5 to 15 years and a fine of $200,000, unanimously affirmed. The matter is remitted to Supreme Court, New York County as to Malangone for further proceedings pursuant to CPL 460.50(5).

This appeal arises out of an undercover operation concerning the private sanitation industry in New York City, in which a cartel of various carters, operating through four trade associations with connections to organized crime, divided the City into zones to exclude competition and exact above-market value from customers, and used violence, threats, boycotts and blockades as a means of compelling other carters to join and obey their rules, one of which was that each carter had "property rights" in its customer, which could be acquired by purchasing it from the current carter at an exorbitant rate calculated on the basis of the monthly rate paid by the customer.

We reject Malangone's claim that his convictions for extortion and coercion in connection with one particular customer were not supported by legally sufficient evidence or were against the weight of the evidence. The evidence permitted the reasonable inference that he knew of and approved his subordinate's actions and threats, and both the undercover detective and the owner of the company in which the detective was posing as "manager" testified that they feared the company's employees would

be hurt and that its property would be damaged if they did not make the payments demanded. The undercover detective's state of mind on this issue was relevant to establish Malangone's intent to intimidate (*see, United States v Goodoak*, 836 F2d 708 [1st Cir]), and the court's charge on the issue was appropriate. The court properly declined to instruct the jury as to certain principles of agency law that had no applicability to the situation presented herein, where the detective was simultaneously an employee of the Police Department and, in his undercover role, a manager of a corporation victimized by defendants' extortionate and coercive conduct.

The court gave correct and balanced jury charges on the People's burden of proof, extortion, coercion, combination in restraint of trade, and conspiratorial liability, and its supplemental charge in response to a jury note on guilt by association was meaningful and correct. The instruction that entrapment was not a defense was appropriate in light of the implications of defendants' summation.

The testimony of the undercover detective and various FBI agents concerning the structure of certain organized crime "families" and defendants' connection thereto was properly admitted (*see, People v Barone*, 221 AD2d 553, *lv denied* 87 NY2d 897, *habeas corpus denied sub nom. Barone v Williams*, ___F Supp ___ [Nov 21, 1997], 1997 US Dist LEXIS 19432 [EDNY]; *see also, United States v Locascio*, 6 F3d 924, 936-939 [2d Cir], *cert denied* 511 US 1070; *United States v Amuso*, 21 F3d 1251, 1263-1264 [2d Cir], *cert denied* 513 US 932).

The trial court properly required defendants to make a good faith offer of proof concerning certain proposed defenses, and the conditions that the court required defendants to meet in connection with such defenses were reasonable, because the proposed defenses were extremely far-fetched and the court's restrictions were necessary in order to prevent the jury from being confused and misled. The court properly allowed defendants to argue to the jury concerning facts in evidence.

The Organized Crime Control Act ("OCCA"), codified at Penal Law § 460.00, *et seq.*, pursuant to which defendants were convicted of enterprise corruption, is not unconstitutionally vague under the facts at hand (*see, People v Barone*, 221 AD2d 553, *supra; People v Cantarella*, 160 Misc 2d 8, 13; *People v Wakefield Fin. Corp.*, 155 Misc 2d 775, 783-784). Both Malangone and Francolino were convicted of at least three criminal "acts," sufficient to support a conviction under OCCA.

The court properly exercised its discretion in denying defendants' severance motions, since evidence of the violent acts by codefendants, who pleaded guilty mid-trial, would have been admissible even if defendants had been tried separately (*see, United States v Casamento*, 887 F2d 1141, 1153 [2d Cir], *cert denied* 493 US 1081). It was also a provident exercise of discretion to deny a mistrial once certain codefendants pleaded guilty during trial, since the People did not try to gain a tactical advantage, the court gave a limiting instruction, and the jurors asserted that they had not read or heard anything about what had happened to the codefendants (*see, People v Mirenda*, 23 NY2d 439, 450).

Defendants' convictions for a City-wide Donnelly Act violation and the individual violations directed against specific customers and competitors are not multiplicitous and consecutive sentences thereon were appropriate (*see, People Demetsenare*, 243 AD2d 777, 779-780, *lv denied* 91 NY2d 833).

The process by which the Trial Justice was assigned to preside complied with the applicable rules and was in no way prejudicial to defendants (*see, Matter of Coastal Oil New York, Inc. v Newton*, 231 AD2d 55, *lv denied* 91 NY2d 808). The Court's expansion of the jury pool to 72 prospective jurors was appropriate under the circumstances, and not violative of CPL 270.15(1)(a) (*see, People v Camacho*, 230 AD2d 604, *affd* 90 NY2d 558). The completion of cross-examination of a witness who suffered severe respiratory failure at the beginning of his cross-examination, by means of a videotaped conditional examination in the hospital, was permissible under CPL 660.10 and 660.30(1).

Although defendants objected to certain questions by the court, they made no claim concerning the court's overall conduct of the trial. Therefore, their present claims of judicial bias and interference are unpreserved and we decline to review them in the interest of justice. Were we to review these claims, we would find that the court's questioning of witnesses was not overly intrusive, and its rulings and comments did not prejudice defendants, particularly in light of the few cited instances and the length of the trial (*see, People v Gonzalez*, 38 NY2d 208, 210).

We perceive no abuse of sentencing discretion.

We have considered and rejected defendants' remaining claims.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 21, 1999

/s/ Catherine O'Hagan Wolfe
CLERK

[TRIAL COURT'S DECISION AND ORDER DENYING MOTION FOR RE-ASSIGNMENT]

SUPREME COURT OF THE STATE
OF NEW YORK COUNTY OF NEW YORK:
PART 88

THE PEOPLE OF THE STATE OF NEW YORK -against- ASSOCIATION of TRADE WASTE REMOVERS of GREATER NEW YORK, Inc. et. al.	IND. NO.: 5614/95

Defense counsel for the above named defendant has filed a motion [joined in by other co-defendants] for re-assignment of this case to a different judge.

The Court of Appeals has held that absent a legal disqualification under Judiciary Law § 14.[1], a trial judge is the sole arbiter of recusal. *People v. Moreno,* 70 NY2d 403 [1987]. This discretionary decision is within the personal conscience of the court when the alleged appearance of impropriety arises from inappropriate awareness of "nonjuridicial data". When the alleged impropriety arises from information derived during the course of a

[1] "A judge shall not sit as such in, or take part in the decision of, an action, claim, matter, motion or proceeding to which he is a party, or in which he has been attorney or counsel, or in which he is interested, or if he is related by consanguinity or affinity to any party to the controversy within the sixth degree . . ."

judge's function, the Court held that recusal could not be directed as a matter of law and a court's decision in this respect may not be overturned unless it was an abuse of discretion. *Id.* at 404. *See, also, People v. McCann*, 85 NY2d 951 [1995]; *People v Martuzas*, 637 NYS2d 569 [1996].

Under Judiciary Law § 14, there is clearly no authority for disqualifying the court from presiding over this case. Considering this as a recusal motion, the court has examined her conscience and is convinced that she can give both sides a fair trial. Defense counsel has labelled his motion a request for "reassignment" rather than recusal in the hope of creating a litigable issue. This motion, by any name, is denied.

Counsel for the defense alleges that the District Attorney selected the court to preside over this case and that the judge's supervision of some of the wiretap applications and resulting familiarity with the facts of the case are harmful to the defendants.

Initially, the court notes that defense counsel does not allege that the rules and regulations governing assignments in this case were not complied with [Notice of Motion by Diarmuid White, esq. p.3-4 and accompanying Memorandum of Law, p.8 fn.4]. As both the defense and the People have stated, the assignment of this court to this case for trial purposes was done in accordance with the rules of the Administrative Judge.

With regard to the defendant's claim that the court's familiarity with the facts of the case is detrimental to the defense, the Court of Appeals has addressed this issue in *People v Liberatores*, 79 NY2d 208 [1992] and *People v Tambe*, 71 NY2d 492 [1988]. In *Tambe*, the Court stated:

> [n]othing in the statute prevents the Judge issuing a warrant from entertaining a motion to suppress evidence seized pursuant to it (see, CPL, 710.50[1]; 700.05[4]), and we see no reason for a rule prohibiting him from doing so. There is no basis to conclude that such judges fail to give suppression motions anything less than fair and impartial consideration and further review is available by the Appellate Division which possesses the same power in such matters as does the suppression court (CPL 470.15).

People v. Tambe, 71 NY2d at 506.

Defense counsel attempts to demonstrate the court's familiarity with the facts of the case by referring repeatedly to the minutes of the defendants' arraignment. The court notes, however, that each and every defendant was able to post bail set by the court within 24 hours and each was released shortly thereafter. Consequently, the defendants' claim that the court's familiarity with the case was harmful to the defense is unsupported.

Finally, the court notes the absurdity of the defense position that a judge's familiarity with a case should result in "reassignment". Defense counsel apparently envisions a courtroom to be a place:

> [w]here blind and naked Ignorance
> delivers brawling judgments, unashamed,
> On all things all day long.
> – Alfred, Lord Tennyson

On the contrary, this court believes that every judge should be as familiar as possible with the facts of each

case over which he or she presides. The Court of Appeals agrees with this position, *People v Tambe, Id.*[2]

For the foregoing reasons, the defendant's motion for recusal is denied.

With regard to the Defendants' Sur-Reply to the People's Reply Motion to the Defendants' Affirmation in Opposition to the People's original Notice of Motion to preclude further motions, the court finds as follows:

"[q]uid loquar de utilitate stercorandi?"

– Cicero

So Ordered.

Dated: May 13, 1996

/s/ LCS
Hon. Leslie Crocker Snyder

---

[2] So, apparently, does a higher authority: "Be not ignorant of any thing in a great manner or a small." – Ecclesiasticus, 5:15.

[TRIAL COURT'S ORAL RULING
DENYING MOTION TO RENEW]

[5586] SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 88

The People of the State of New York

- against -

ASSOCIATION OF TRADE WASTE REMOVERS
OF GREATER NEW YORK, INC., ET AL.

Defendants.

June 26, 1997

BEFORE:

HONORABLE LESLIE CROCKER SNYDER,

Justice, and a Jury

(Appearances same as previously noted.)

* * *

[5676] THE COURT: . . .

The witness and the jury, please.

Your motion, Mr. White, is denied.

(Whereupon, the People's witness, Detective Richard Cowan, resumed the witness stand.)

* * *

[CERTIFICATE DENYING LEAVE TO APPEAL TO NEW YORK COURT OF APPEALS]

State of New York

Court of Appeals

BEFORE: HON. ALBERT M. ROSENBLATT,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ASSOCIATION OF TRADE WASTE REMOVERS OF GREATER NEW YORK, DUFFY WASTE AND RECYCLING CORP., and JOSEPH FRANCOLINO,

Appellants,

ALFONSO MALANGONE,

Defendant.

CERTIFICATE DENYING LEAVE

I, ALBERT M. ROSENBLATT, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission is hereby denied.

Dated at Poughkeepsie, New York

March 21, 2000

/s/ _____
Associate Judge

**Description of Order:* Order of the Appellate Division, First Department, entered December 21, 1999, affirming a judgment of the Supreme Court, New York County, rendered November 18, 1997.

[COURT'S CHARGE ON REASONABLE DOUBT]

SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK

What is proof beyond a reasonable doubt? It is a very difficult term to define. Let me start by saying this: Let's discuss what it is not.

A reasonable doubt is not just any kind of doubt. It's not a whim, or a guess or a feeling that someone may not be guilty. The human mind can conceive of a doubt in virtually every and any situation. The requirement of proof beyond a reasonable doubt is not a requirement of proof beyond all doubt, or beyond any doubt or to a mathematical or scientific certainty. Why not? Because that would not be possible in courts of law where testimony – cases rest upon testimony of human beings and human recollection. It wouldn't be possible. And the law recognizes that fact. The law has created a very high standard of proof in criminal cases, much higher than in a civil case for example. But it is not an impossible standard of proof. It is proof beyond a reasonable doubt. Proof beyond a reasonable doubt. Nor is the rule of guilt beyond a reasonable doubt to be used by any juror as an excuse to avoid performing what may be a disagreeable duty. A reasonable doubt is a doubt which you conscientiously have after the use of your powers of reasoning which arise out of the credible evidence or lack of credible evidence in the case. It is a doubt for which you can actually give a reason. The standard of reason must prevail. And if and when you are convinced that you have no doubt in reason of a defendant's guilt, then that is sufficient and you must render a verdict accordingly.

On the other hand, obviously, if you have such a reasonable doubt arising out of the credible evidence or lack of it as to any element of any particular crime charged to you, then the benefit of the doubt must be obviously given to the defendant. (T 12298-99)

(2)

No. 99-1967

Supreme Court, U.S.
FILED
JUN 30 2000
CLERK

In The

Supreme Court of the United States

JOSEPH FRANCOLINO, et al.,

Petitioners,

v.

STATE OF NEW YORK,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New York Appellate Division, First Department

MOTION BY NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS and NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI WITH BRIEF ATTACHED

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22pp

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

The National Association of Criminal Defense Lawyers and its New York affiliate, the New York State Association of Criminal Defense Lawyers, hereby move, pursuant to Rule 37.2 of the Rules of this Court, for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari to the New York Supreme Court, Appellate Division, First Department. Petitioners have consented to the filing of this brief, but Respondents have declined to consent to this brief being filed. A copy of the proposed *amici* brief is attached.

As noted in the Statement of Interest of the *Amici*, the issue presented in this case is of great importance to the criminal justice system. There is nothing more important in a criminal trial than having a fair adjudicator when essential issues of life and liberty are at stake. The parties and the public at large must believe that a criminal case is being presided over by a judge who is fair and was selected in an impartial manner. To have one party select the judge undermines the public's confidence in the fairness of the entire procedure.

In addition, the question arises as to the proper Constitutional test to be applied when a judge is selected by one party: in such a situation, is the fairness of the trial so compromised that this Court's "structural error" analysis must apply? Or is some form of "harmless error" rule appropriate?

These questions are vital to the operation of the criminal justice system. *Amici* and its members, some 10,000 attorneys working throughout the nation in the

criminal justice system, are vitally concerned about these questions, which they frequently confront. For these reasons, *Amici* request that the Court grant leave to file the attached brief in support of the Petition for Certiorari.

Respectfully submitted,

Dated: New York, N.,Y,
June 27, 2000

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BRIEF OF AMICI NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

This brief *amici curiae* is submitted in support of the Petition for Certiorari filed by Petitioners Joseph Francolino, Afonso Malangone, Duffy Waste and Recycling Corp and the Association of Trade Waste Removers of Greater New York, Inc.[1]

INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The NACDL was founded in 1958 to promote study and research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner.

The New York State Association of Criminal Defense Lawyers is the New York State affiliate of the National Association of Criminal Defense Lawyers. It is a

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[1] As required by Rule 37.6 of this Court, *amicus curiae* submits the following: no party or party's counsel authored this brief in whole or in part; no person or entity other than *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

membership organization of more than 1,000 attorneys who practice law in the State of New York. Its members regularly practice in the Criminal Branch, Supreme Court, New York County and are subject to and have suffered under the practice complained of here.

In the view of the *Amici*, this case presents an issue crucial to the fair operation of the criminal justice system: namely, is it a violation of due process for one party to a criminal proceeding to select the judge who will hear the case. The *Amici* believe that any system that allows one party to make such a selection violates a key principle of due process, namely that "justice must satisfy the appearance of justice," *In re Murchison*, 349 U.S. 133, 136 (1955). Because the system under which Petitioners were tried permitted such a choice, the conviction violated the due process clause of the federal Constitution.

STATEMENT OF THE CASE

A system of random selection of judges is generally followed in the criminal courts of the State of New York. The Uniform Rules for New York State Trial Courts mandate, with limited exceptions, random assignment of judges to criminal matters. See 22 NYCRR §200.11(c). The 1986 Individual Assignment Plan establishes procedures for such random assignment, including special procedures for random assignment of judges to cases deemed complex. Every state court in the New York City area which hears felony cases has instituted procedures, albeit varying, providing for random assignment of judges, in all criminal cases. In addition, the United States District Courts for the Southern and Eastern Districts of New York also

randomly assign judges to criminal matters at arraignment.

The Uniform Rules allows the Chief Administrative Judge to make unspecified exceptions from the random selection system (see 22 NYCRR § 200.11(a)). Prior to 1995, the District Attorney of New York County (Manhattan), relying upon this loophole, had effected the assignment of cases by seeking out a certain few judges, believed by the criminal bar to be, with rare exception, strongly pro-prosecution, for the issuance of *ex parte* orders, such as eavesdropping orders, search warrants or certificates for out-of-state subpoenas. Thereupon, after having initially involved a specific judge in the matter under investigation, the District Attorney would request that the judge he had chosen for investigation purposes should then convene a grand jury and receive any indictment handed down by that grand jury. The judge would do so as a matter of course. That judge would then act as trial judge in the matter.

The result of this historical approach has been that the District Attorney has, by his manipulation of the selection of judges to preside over investigations and special grand juries, chosen the judge to preside over the indictments returned by those grand juries. Through the procedure noted above, prosecutors in New York County effectively selected a trial judge by making the unsupervised initial selection of a judge to sign a warrant or the selection, sometimes supervised and sometimes unsupervised, of a judge to preside over a grand jury.

There has been extensive professional criticism of this practice in recent years as well as litigation to halt the practice. [2]

At a previous time, responding to professional criticism of the system, the Administrative Judge issued a new policy relating to the selection of judges. In a Memorandum dated October 2, 1995, a new policy was established, as follows:

> 2) Any indictment returned by a Special Grand Jury convened after September 1,

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[2] The Appellate Division, First Department, refused to issue a writ of prohibition in *In re Coastal Oil New York, Inc. v. Newton*, 231 A.D.2d 55, 660 N.Y.S. 428 (1st Dept. 1997), a case involving a pretrial effort to remove a judge selected by the system at issue, in which no conviction had yet occurred. In addition, in *New York Criminal Bar Association v. Newton*, 33 F.Supp.2d 289, 293 (S.D.N.Y. 1999), a federal court dismissed an action challenging the practice on the grounds that the criminal defendant party's (Coastal Oil) challenge was moot since a new judge was selected in the trial not applying the system. In addition, the court held that the bar association and individual lawyer plaintiffs had no standing to challenge the system, absent a real case in which the practice was applied. "The only specific injury that plaintiffs claim to have suffered concerns the assignment of Justice McLaughlin to Coastal's case; as noted above, that issue has become moot during the brief life of this litigation. Without any other specific instance of illegality alleged, there is no present case or controversy for this court to decide. . . . The associations and their individual members simply have not sustained any actual or threatened injury."

> 1995 must be scheduled for arraignment in the regular Grand Jury Part for the term. After arraignment, the case(s) will be assigned to a judge by the administrative judge.
>
> 3) Any indictment returned by a Special Grand Jury empanelled before September 1, 1995 will be assigned to the judge who supervised the Grand Jury. This assignment is for all purposes, including arraignment. However, the administrative judge may transfer the case for trial, or any other purpose, to any other judge.

This practice of the Manhattan District Attorney selecting the judge to empanel and supervise the grand jury and to receive any indictments and afterwards to try the case existed at the time that the indictment was returned in this case. See Affidavit of Juanita Bing Newton, dated June 16, 1997, par. 4, submitted in *In re Coastal Oil New York, Inc. v. Newton*, 231 A.D.2d 55, 660 N.Y.S.2d 428 (1st Dept. 1997): ". . . the practice of the District Attorney selecting a judge to empanel and supervise a grand jury and to receive any indictments voted by such body was being *discontinued*" (emphasis added), showing that the practice existed prior to that date.

Whatever later modification occurred in the practice after 1995 did not effect the procedures in this case: there is no doubt that the District Attorney's Office selected Judge Leslie Crocker Snyder to sign the original warrants. She was then selected on November 9, 1994 to supervise the grand jury and pursuant to firmly established policy by the Administrative Judge for the criminal part as noted above, Judge Snyder was selected

to preside over the trial pursuant to her prior familiarity in this case.

REAONS FOR GRANTING THE WRIT

DUE PROCESS IS VIOLATED AND THE STRUCTURAL PROCESS OF A CRIMINAL TRIAL UNDERMINED IF ONE PARTY TO THE PROCEEDING IS ALLOWED TO SELECT THE TRIAL JUDGE

This case presents the direct question of whether the selection of a judge by one party to a criminal proceeding so undermines the appearance of justice that any conviction secured before a judge selected on that basis must be automatically reversed on due process grounds. Based on the analysis below, the answer must be that any such conviction cannot be upheld, since the selection of a judge by one party undermines the other party's confidence in the fairness of the proceeding and, as well, the public's sense of fair procedure. It constitutes "structural error," requiring automatic reversal.

Contrary to the normal rule of random selection that is the standard required by 22 NYCRR §200.11(c) of the Uniform Rules for the New York State Trial Courts and that virtually every court in this country follows, the district attorney's office in New York County selected the judge to sign search and wiretap warrants in this case, namely The Honorable Leslie Crocker Snyder. Thereafter, Judge Snyder was selected to supervise the special grand jury investigations into this matter. Then, as a matter of practice, routine and "history" as explained above, Judge Snyder was later assigned by the Administrative Judge of the Criminal Term of the Supreme Court for New York

County to preside at the trial. In this manner, the District Attorney's office in New York County, in effect, selected the judge.

This practice has received considerable attention and criticism from the organized bar. In May, 1998, the Criminal Advocacy Committee of the Association of the Bar of the City of New York issued a special report, "Report on the Assignment of Trial Judges," condemning this selection process: "The Association believes that this deviation from the rule of random selection that is embodied in the Uniform Rules is contrary to law and contravenes basic precepts that govern the fair and impartial administration of criminal justice." Trial Judges' Assignment Report at p. --. The Legal Aid Society wrote in a recent brief that the practice "damaged the administration of justice [and] ...produced a result egregiously at odds with the goals of the court rules and the impartial administration of justice." Brief submitted in *In re Coastal Oil New York, Inc. v. Newton*, 231 A.D.2d 55, 660 N.Y.S.2d 428 (1st Dept. 1997). The Association of the Bar had previously noted that the practice creates, at the least, an improper appearance that "one litigant [the District Attorney] has an advantage over other litigants." The New York State Association of Criminal Defense Lawyers, has called the practice "an invidious evil [and] manifestly unfair" in its brief in the *Coastal Oil* case.

The recommendation of the Criminal Advocacy Committee of the Association of the Bar of the City of New York correctly describes the danger to the administration of justice created by the current situation:

> The Association of the Bar believes that the appearance of propriety in the administration of justice is an important issue. . . . The

> Association's position is that the public, all litigants and the members of the Judiciary themselves should know that the selection of judges to try particular cases is purely random, so it can never appear that one litigant has an advantage over other litigants.

Trial Judges' Assignment Report at p. --.

The *Amici* believe that such a practice violates two of the most important requirements of the due process clause of the federal Constitution: namely the requirement that a neutral and detached judge must preside over any criminal trial and the requirement that such a judge must be selected in a manner that satisfies the appearance of evenhanded justice. See e.g. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) and *Aetna Life insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986): "The Due Process Clause 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales equally between contending parties. But to perform its high function in the best way, "justice must satisfy the appearance of justice."'" [citing *In re Murchison*, 349 U.S. 133, 136 (1955).

It is a basic principle of due process that any proceeding must be heard by an impartial judge. The selection of a judge by one party cannot satisfy the requirements of due process. This Court has noted in a series of cases:

> Before one may be deprived of a protected interest, whether in a criminal or civil setting, see *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, and n. 2, (1980), one is entitled as a matter of due process of law to an adjudicator who is not in a

> situation "'which would offer a possible temptation to the average man as a judge ... which might lead him not to hold the balance nice, clear and true....'" *Ward* [*v. Village of Monroeville, Ohio*, 409 U.S. 57 (1972)] at 60, (quoting *Tumey, supra*, 273 U.S., at 532).

Concrete Pipe and Products of California v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 617-18 (1993)

Equally important, it must appear to the parties and to society at large that the selection of the adjudicator was accomplished by a fair process. Justice Kennedy noted in his concurring opinion in *Liteky v. United States*, 510 U.S. 540, 558 (1994): "One of the very objects of law is the impartiality of its judges in fact and *appearance*." (emphasis added). Justice Scalia explained further in his dissenting opinion in *J.E.B. v. Alabama*, 511 U.S. 127, 161 n. 3 (1994):

> Wise observers have long understood that the appearance of justice is as important as its reality. If a system of peremptory strikes affects the actual impartiality of the jury not a bit, but gives litigants a greater belief in that impartiality, it serves a most important function . . . *In point of fact, that may be its greater value.* (emphasis added).

Similarly here, the appearance that one party selected the judge that heard the case would totally undermine the other party's "belief in that impartiality." More important it would undermine the public's confidence in the impartiality of the system.

The Louisiana Supreme Court, faced with an extremely similar procedure stated: "To meet due process requirements, . . capital and other felony cases must be allotted for trial . . . on a random or other rotating basis or under some other procedure . . . which does not vest the district attorney with power to choose the judge to whom a particular case is assigned." *State v. Simpson*, 551 So.2d 1303, 1304 (La. 1989).

The implication that there can be no due process violation unless the judge selected by one party actually makes a biased ruling is plainly incorrect. The Court below gave short shrift to this important issue. It stated in one sentence that: "The process by which the Trial Justice was assigned to preside complied with the applicable rules and was in no way prejudicial to defendants (see *Matter of Coastal Oil New York, Inc. v.* Newton, 231 A.D.2d 55 . . ." Pet. for Cert., App. 7. In the *Coastal Oil* case, the Court had noted: "There can be no due process violation without actual prejudice. Petitioners have suffered none. Their claims of prejudice are purely speculative. Nor do they even assert that any ruling made thus far by the presiding judge has been affected by bias." 231 A.D.2d at 57-58.

The "prejudice" prohibited by the due process clause cannot be restricted to an obviously biased ruling. It must include the "appearance" of partiality, as this Court has noted numerous times, since a party is prejudiced in having to submit to a trial before a judge selected in an patently partial manner which undermines the party's (and the public's) confidence in the fairness of the proceedings.

This Court has noted that there are certain trial errors which are so crucial to the fair administration of justice that the only remedy is automatic reversal.

> Indeed, we have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927) (biased trial judge); *Vasquez v. Hillery*, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (denial of public trial); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (defective reasonable-doubt instruction)).

Neder v. United States, 119 S.Ct. 1827, 1833 (1999).

The proposition that a "biased" trial judge so taints a proceeding that no further inquiry into actual prejudice is necessary has been accepted by this Court in many cases. See e.g. *Johnson v. United States*, 520 U.S. 461, 469 (1997).

The Tenth Circuit in its recent decision in *United States v. Pearson*, 203 F.3d 1243 (10th Cir. 2000) suggested, erroneously we believe, that prosecutorial selection of a judge in that case was not the form of

"judicial bias" that falls into the "structural error/automatic reversal" category. In that case, the power of prosecutorial selection was "limited": prosecutors were apparently able to steer a superseding indictment only to one of a small group of judges to whom the original cases were already assigned. The court noted that "the alleged manipulation of the case assignment system will [not] recur in a large number of cases." 203 F.3d at 1265. Thus the error was placed in a "continuum" of trial errors, and the harmless error rule was applied. However, the fact that the prosecutors were able in any way to affect the selection of the judge should trigger the "structural error/ automatic reversal" rule.

In any event in this case, there was no limitation in the prosecutor's ability to select the judge. The Manhattan District Attorneys had the entire criminal term bench to choose from -- over 50 judges. Furthermore, the very fact that that the trial judge selected was one who presided over earlier proceedings in the case aggravated the possibility of prejudice.

First, such a system fosters the unseemly and disfavored practice of a judge determining the validity of his or her own ex parte orders, whether a search warrant, an eavesdropping warrant, a subpoena certificate, or another order. Such a system deprives a litigant of the neutral and detached magistrate to which he or she is constitutionally guaranteed. It defies logic to believe that any judge, no matter how well-intentioned, will not have some difficulty, conscious or subconscious, in finding that he or she erred in the issuance of an earlier ex parte order and to controvert that order. While a practice in which judges review warrants or other ex parte orders they have issued may be necessary in counties where there is only one judge sitting in criminal term, there is no justification

for it in a county in which, like New York, there are approximately 50 judges in Supreme Court hearing criminal cases.

Second, under such a system, the judge is almost invariably tainted by the receipt of ex parte information provided to him or her by the prosecutor, often without the defense being aware not only of the nature of the information, but even that the judge has received any ex parte information. The result is that the judge is making critical pre-trial and trial decisions with knowledge of, and perhaps based on, material unknown to the defense and not even in the trial court record and thus subject to review.

Further, a defendant who chooses to exercise his or her New York statutory right to a non-jury trial faces the possibility that the judge will be aware of, and affected by, inadmissible evidence, or worse, unverified and untested information which has, unknown to the defendant, been provided to the judge by the prosecutor during the investigative stage. While in some non-jury trials, the judge has prior to trial heard evidence inadmissible at trial (such as a confession which has been suppressed), the defendant who chooses to waive a jury is aware of the extent of the judge's knowledge and makes a knowing waiver. A lawyer is unlikely to counsel a client to seek a bench trial before a judge who has supervised the grand jury given the potential problems. This is especially unlikely when the judge has been chosen by his adversary. Effectively, therefore, the defendant is denied his statutory right to non-jury trial.

Third, there is a considerable danger that a judge who becomes involved in the investigative stage will lose his or her objectivity and become inextricably intertwined

with, and psychologically involved in, the prosecution. It is too much to expect a judge who has participated heavily in an investigation to later revert to the role of an independent, impartial and detached arbiter.

Fourth, there is the clear appearance of injustice in the heavy involvement of a judge in an investigation whose results he or she is called upon to adjudicate. A defendant accused of crime (and the legal profession and general public) can hardly expect a fair and independent determination by a judge asked to rule, for instance, over the propriety of the procedures of a grand jury he or she has supervised or the existence of probable cause for an eavesdropping warrant he or she has signed.

Fifth, such a system is at the very least susceptible to influence by one party to the litigation -- the District Attorney.

For these reasons, any practice of assigning indictments in cases to those judges who preside over the grand juries which return those indictments -- even if the judges were chosen independently without input or manipulation by the District Attorney -- has serious negative effects on the criminal justice system. These negative effects are far greater -- given the popular perception that the selection of judges in those cases is affected by the District Attorney. Many judges believe that the way to assignment to high-profile cases is a consistent record of pro-prosecution rulings. They believe that rulings for the defense -- even if they believe in their independent judgment called for -- might have an adverse effect on their own careers. New York State Supreme Court judges are elected and are therefore subject to public and political pressures. While the vast majority of judges, make efforts to apply the law in a just and

independent manner, a judge should never be faced with the pressure that a decision adverse to one party will affect the future assignment of cases to him or her and his or her career path. The harm of such a perception to an independent judiciary and a fair and impartial system of justice is great.

While investigative grand jury judges may have issued ex parte orders such as eavesdropping orders, search warrants, or the like, they have not read the grand jury minutes, have not heard any defense applications (except in very rare instances), and have not instructed the grand jury on the law. To the extent they do have familiarity with the matter it is based almost always solely on ex parte communications from one party to the eventual litigation - the District Attorney. Prior familiarity with the matter should, therefore, be a disqualification, not a qualification.

As the recent Association of the Bar of the City of New York Report notes:

> There is no merit to the claim that judicial economy and efficiency are properly served by assigning a complex case for trial to the judge who supervised the grand jury investigation that produced the indictment. A judge who approves the issuance of a search or eavesdropping warrant or who rules on the propriety of a grand jury subpoena is not necessarily capable of effectively managing a lengthy, multi-defendant trial involving complex issues of law and fact that may be entirely unrelated to the warrant issued, the electronic surveillance supervised or the subpoena litigation resolved. The experience, skill, acumen, patience and wisdom that a judge needs to preside

> over an indictment in a high profile, complex criminal prosecution does not necessarily depend on some limited familiarity with the preceding grand jury investigation. The random assignment of federal judges in complex multi-defendant criminal prosecutions in the Southern and Eastern Districts of New York has not adversely affected the ability of those courts to manage such cases effectively.

Criminal Advocacy Committee, "Report on the Assignment of Trial Judges," May, 1998 at pp. --.

The recommendation of the City Bar Association correctly describes the danger to the administration of justice created by the current situation:

> The Association of the Bar believes that the appearance of propriety in the administration of justice is an important issue. . . . The Association's position is that the public, all litigants and the members of the Judiciary themselves should know that the selection of judges to try particular cases is purely random, so it can never appear that one litigant has an advantage over other litigants.

Id. at ---.

CONCLUSION

For the reasons stated above, Petitioners' Petition for Certiorari should be granted.

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